SUPREME COURT, U. S.

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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

# Supreme Court of the United States

October Term, 1968

No. 920

SHIRLEY A. THOMAS, as Administratrix of the Estate of Donald B. Thomas,
and
JOHN F. WYNN, JR., *Petitioners,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### QUESTION PRESENTED

Whether the District of Columbia may be held liable for the death of one lifeguard and for injuries to another as a result of a mid-afternoon accident caused by a faulty underwater electric light fixture at a swimming pool owned by the United States and leased to, operated and maintained by a private corporation, merely because the District, in the

mornings before the pool was opened to the public, sponsored free swimming classes at the pool and, for such instruction during the morning hours, paid the lifeguards for their services as swimming instructors.

## STATEMENT OF THE CASE

### The Pleadings

Petitioner Shirley A. Thomas, Administratrix of the Estate of her husband, Donald E. Thomas, instituted an action against respondent District of Columbia in the United States District Court for the District of Columbia to recover damages resulting from the allegedly wrongful death of her husband. Petitioner John F. Wynn, Jr., also instituted an action against the respondent District of Columbia to recover damages for personal injuries sustained in the same accident as that resulting in the death of Thomas. The cases were consolidated for trial, and the jury returned a verdict for Thomas in the amount of $156,225, and returned a verdict for Wynn in the amount of $28,000. The District Court denied the District's motion for judgment *non obstante veredicto* in each case, but reduced the Thomas verdict to $91,225 (J. A. 136-138). Judgments were accordingly entered against the District of Columbia in favor of Thomas in the amount of $91,225, and in favor of Wynn in the amount of $28,000 (J. A. 138). The District of Columbia appealed to the United States Court of Appeals for the District of Columbia Circuit from the two judgments, and Thomas likewise appealed from that portion of the order entering judgment in her favor in an amount less than the jury verdict.

The Court of Appeals, in reversing the two judgments entered against the District and in dismissing the appeal of Thomas as moot, stated that "[t]he record indicates to us that the District had no actual control or responsibility relevant to the cause of the accident."

## The Facts

The accident giving rise to this litigation occurred on August 1, 1960, at about 3:30 p.m., when a short circuit developed in one of the underwater electric light fixtures of the Banneker Swimming Pool, located in the District of Columbia. Thomas alleged in her complaint against the District of Columbia, and others, that the District was negligent in permitting the underwater electric light fixtures to remain in a defective condition (J. A. 6-8), and Wynn alleged in his complaint against the District of Columbia, and others, that the District (1) permitted electrical current to be supplied to Government Services, Inc.,[1] the lessee of the pool, without first ascertaining that the pool's electrical system was safe, (2) failed to make and/or require proper inspections of the pool's electrical system, (3) permitted the pool's electrical system to remain in a defective condition, and (4) permitted the supplying of water to the pool without first ascertaining that the electrical system was safe (J. A. 17-20).

The evidence at trial disclosed that on August 1, 1960, at about 3:30 p.m., Mr. Kelley, an independent electrical contractor with Goverment Services, Inc., was installing some overhead electrical lights in the basement of the pump house at the Banneker Swimming Pool (J. A. 39-40). He called to his 11½ year-old son, who was standing on the ground floor of the pump house, to turn off the top three switches on the left-hand side of the switch box, located just inside the door of the pump house. The boy turned off these switches, and a few minutes later was instructed by his father to turn the switches back on. The boy, forgetting the number of switches he had turned off, turned on, in addition to the top three switches, some switches located immediately below the top three. The lower switches

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[1] Government Services, Inc. is a private, non-profit corporation (Transcript, p. 250).

activated the underwater lights of the pool, and, because of a short circuit later discovered in one of the underwater light fixtures, a charge of electricity entered the pool. (J. A. 40.)

Rodney D. McKnight, a 12 year-old boy who was swimming in the pool at the time, was stricken by this charge of electricity (J. A. 38).[2] Donald E. Thomas, one of the lifeguards on duty, apparently noticed that McKnight was in difficulty and, being unaware of the cause of the difficulty, entered the water to assist McKnight. Thomas, too, received an electric shock which resulted in his death. (J. A. 42-43.) John F. Wynn, Jr., another on-duty lifeguard, ran to the scene and saw Thomas lying on the deck of the pool and McKnight at the bottom of the pool. Wynn, being also unaware of the cause of the difficulty to Thomas and McKnight, entered the water to recover McKnight. Upon doing so, he received an electric shock, which resulted in his injuries (J.A. 29).

Preliminary tests disclosed that electricity was entering the water from a particular underwater electric light fixture (J. A. 47). The pool was drained at the direction of a United States Government official (J. A. 44), and further tests were conducted the following morning (J. A. 47-48). The electric light fixture was found to be about half full of water (J. A. 48), and the insulation on the wires, as well as the rubber hose encasing the wires, had, as a result of the presence of moisture, become deteriorated (J. A. 51-52). The water in the fixture apparently penetrated the insulation of one of the wires, causing a short circuit (J. A. 52-53). Ordinarily, the ground wire leading from the fixture would have carried the current back to the circuit breaker,

[2] The Administratrix of the Estate of Rodney D. McKnight instituted a wrongful death action (C. A. 2404-61) against the United States (the owner of the pool), Government Services, Inc., and the District of Columbia, but the complaint against the District of Columbia was, with the consent of all parties, dismissed at pretrial, and the remaining defendants effected a settlement of the lawsuit. (See footnote 1 to opinion of Court of Appeals.)

causing the circuit breaker to "trip" (i. e., cut off the flow of electricity), but the ground wire, being too small for the size of the circuit breaker, burned out before it could carry the necessary current to "trip" the circuit breaker (J. A. 80). The electrical system for the pool was originally installed in 1934 by a contractor engaged by the United States Government (J. A. 89), and, in 1950, the United States caused the pool to be completely rewired, including the installation of new wires to all the underwater fixtures (J. A. 25, 93-95).

The swimming pool has always been owned by the United States Government, and, on the day of the accident and for a number of years prior thereto, it was, by virtue of a contract, operated by Government Services, Inc., a non-profit private corporation (J. A. 85, 87-89). The contract provided that Government Services, Inc. was responsible for the maintenance of the pool, including the maintenance of the underwater electric light fixtures (J. A. 89-90). Government Services, Inc., assumed this responsibility by contracting with Ansel P. Kelley to perform all the necessary electrical maintenance at the pool (J. A. 90-91). Mr. Kelley had instructions that he was to inspect the underwater lights at least four or five times during the season (J. A. 91-92). Just three days prior to the accident, he had removed all the underwater light fixtures from their sockets and had laid them and the connecting wires on the deck of the pool (J. A. 31, 91). His instructions at that time were to examine each of the underwater lights (J. A. 90-91), and the supervising Government Services, Inc., official personally saw him take the screens off two of the fixtures and examine the wires leading to the light fixtures (J. A. 91). Mr. Kelley did not report any defect in the lighting system to the Government Services, Inc., official, and Government Services, Inc., had no knowledge of any defects (J. A. 92).

The District of Columbia's only connection with the Banneker Swimming Pool was that on the day of the accident, and for a number of years prior thereto, it had an arrangement with Government Services, Inc., whereby the District of Columbia would conduct free swimming lessons at the pool between the hours of 9:00 a.m. and 12 noon (J. A. 27-28, 71-73). In order that these swimming lessons could be given without a charge, the District was required to pay, for the three hours involved, the salaries of the lifeguards used by Government Services, Inc. (J. A. 28, 87). The District did not pay the salaries of the lifeguards in the afternoon (J. A. 27), and it did not, for any period, pay any part of the salaries of the other Government Services, Inc., employees at the pool. The manager of the pool and the attendants at the bath house, for example, who were on duty both in the mornings and in the afternoons, were paid by Government Services, Inc. (J. A. 73-74, 87, 94-95). The District's arrangement with Government Services, Inc., did not contemplate that the District assume any responsibility for the maintenance of the pool (J. A. 77, 94). Also, since the pool was owned by the federal government, the District of Columbia had no jurisdiction to, and did not, inspect the electrical system at the pool, either at the time of the original installation or at the time it was rewired in 1950 (J. A. 43, 45).

## REASONS WHY THE WRIT SHOULD BE DENIED

### Petitioners have failed to present any substantial federal question warranting the exercise of this Court's jurisdiction to review on writ of certiorari.

It is clear from the record that the only issue involved in the trial court was whether at the time of the unfortunate accident the respondent District of Columbia had any control over the swimming pool or had any responsibility for

the cause of the accident. The facts, as set forth in respondent's statement of the case, with appropriate record references, and also as set forth in the opinion of the Court of Appeals, clearly show that the District did not build, wire, own, control, maintain, operate, or, at the time of the accident, have any connection whatsoever with the Banneker Swimming Pool. Consequently, the Court of Appeals properly rejected the holding of the trial court that the District owed to the stricken lifeguards "a duty to make certain that due diligence was used to keep the pool in a reasonably safe condition and that failure to perform this duty creates liability on its part" (J. A. 128).

Petitioners assert here, however, as they did in the Court of Appeals, that the District of Columbia has a duty to inspect electrical systems on federal property, and that its failure to inspect the electrical system at the Banneker Swimming Pool renders it liable for the resulting damages. Aside from the lack of merit of such an assertion (see *Johnson* v. *Maryland,* 254 U. S. 51 (1920); *United States* v. *City of Philadelphia,* 147 F. 2d 291 (1945); *United States* v. *City of Chester,* 144 F. 2d 415 (1944), no such position was advanced in the trial court. This is made clear in footnote 5 of the opinion of the Court of Appeals.

Nowhere have petitioners set forth any substantial question warranting review by this Court. When the petition is viewed against the background of the record, it becomes apparent that petitioners have endeavored to convert purely factual questions into non-existent constitutional issues. As this Court said in *United Surety Company* v. *American Fruit Product Company,* 238 U. S. 140, 142 (1915), the

> " * * * constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here. * * * "

## CONCLUSION

It is respectfully submitted that the petitioners have presented no substantial and important question calling for review by this Court, and that this petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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